



IN THE
Supreme Court of the United States
OCTOBER TERM 1978

NO. 78-985

GREGORY-PORTLAND INDEPENDENT
SCHOOL DISTRICT, ET AL.,
Petitioners,

v.

TEXAS EDUCATION AGENCY, ET AL.,
Respondents,

UNITED STATES OF AMERICA,
Applicant for Intervention.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RICHARD A. HALL
J. W. GARY
100 Hawn Building
Corpus Christi, Texas 78401
Attorneys for Petitioners

TABLE OF CONTENTS

	Page
List of Authorities	ii
Opinions Below	2
Jurisdiction	3
Questions Presented	3
1. May a federal district court, acting through the medium of a mandatory injunction directed to a state agency (here the Texas Education Agency, a defendant in <i>United States v. Texas</i>), establish a presumption that unconstitutional discrimination has occurred in any school district in the state which has a single school with a Mexican-American enrollment exceeding 66%, require that such school districts be denied accreditation and state funds, and then impose upon those who seek relief the burden of proving, in a distant and inconvenient forum, that no discrimination has occurred?	3
2. May Texas school districts, such as Gregory-Portland Independent School District, which are separate legal entities and which were not parties to <i>United States v. Texas</i> , prove to the Texas Education Agency in local federal courts that they have never discriminated against Mexican-Americans, and that the condition precedent to the imposition of the sanctions set out in <i>United States v. Texas</i> therefore does not exist, or must that proof always be made in the Eastern District of Texas?	4
3. Did the United States Court of Appeals for the Fifth Circuit err in vacating the orders of the United States District Court for the Southern District of Texas at the request of the United States, which was not a party to the original proceeding and which, to this very day, has not been granted leave to intervene at either the trial or appellate level?	4
Statement of the Case	4
Basis for Federal Jurisdiction in the Court of First Instance	12
Argument Amplifying Reasons for Allowance of Writ	13
A. The inflexible standards and venue provisions set out in <i>United States v. Texas</i> were not binding on non-parties such as petitioners	13

	Page
B. Economy and efficiency dictated that the discrimination question be tried in the Southern District Court	18
C. The Eastern District Court's order which provoked the instant suit was based upon a standard which this Court has condemned	20
D. There is no legal precedent for the vacation of the Southern District Court's orders by the Court of Appeals at the instance of a non-party	23
Conclusion	24
Certificate of Service	25

LIST OF AUTHORITIES

CASES		Page
American Securit Co. v. Shatterproof Glass Corp., 268 F.2d 769 (3rd Cir. 1959), cert. den. 361 U.S. 902, 80 S.Ct. 210 (1959)		17
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555 (1977)		22
Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), cert. den. 377 U.S. 924, 84 S.Ct. 1223 (1964)		21
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434 (1971)		13
Brewer v. School Board of City of Norfolk, Va., 456 F.2d 943 (4th Cir. 1972), cert. den. 406 U.S. 933, 92 S.Ct. 1778 (1972)		21
Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976), cert. den. 429 U.S. 104, 97 S.Ct. 812 (1977)		21
Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), cert. den. 389 U.S. 847, 88 S.Ct. 39 (1967)..		21
Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964), cert. den. 380 U.S. 914, 85 S.Ct. 898 (1965)		21
Farmers' Loan & Trust Co. v. Waterman, 106 U.S. 265, 1 S.Ct. 131 (1882)		23
Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115 (1940)		13
Harrington v. Colquitt County Board of Education, 460 F.2d 193 (5th Cir. 1972), cert. den. 409 U.S. 915, 93 S.Ct. 238 (1972)		21

CASES		Page
Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 93 S.Ct. 2686 (1973)		22
Love v. City of Dallas, 40 S.W.2d 20 (Tex. 1931)		14
McKinney v. Alabama, 424 U.S. 669, 96 S.Ct. 1189 (1976)		18
Offermann v. Nitkowski, 378 F.2d 22 (2nd Cir. 1967)		21
Penn Central Merger and N&W Inclusion Cases, 389 U.S. 486, 88 S.Ct. 602 (1968)		17
Pennoyer v. Neff, 95 U.S. 714 (1878)		13
Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965)		21
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267 (1971)		15, 16, 21
United States v. Texas, 321 F.Supp. 1043 (E.D. Tex. 1970), 330 F.Supp. 235 (E.D. Tex. 1971), aff'd. and mod. 447 F.2d 441 (5th Cir. 1971), cert. den. 404 U.S. 1016, 92 S.Ct. 675 (1972)		4, 5, 6, 7, 14, 15
United States v. United States District Court, Southern District of Texas, 506 F.2d 383 (5th Cir. 1974)		10, 23
Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976) .		22
Williams v. Nylund, 268 F.2d 91 (10th Cir. 1959)		17
Winston-Salem/Forsyth County Board of Education v. Scott, 404 U.S. 1221, 92 S.Ct. 1236 (1971)		15
Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562 (1969)		14
STATUTES		
28 U.S.C. § 1254		3
28 U.S.C. § 1331		12
28 U.S.C. § 1343		12
28 U.S.C. § 1391(b)		20
28 U.S.C. § 1983		12
Tex. Education Code § 23.6		14
RULES		
Rule 4(a), Fed. Rules of Appellate Procedure		11
Rule 45(2), Fed. Rules of Civil Procedure		20

IN THE
Supreme Court of the United States

OCTOBER TERM 1978

NO. _____

GREGORY-PORTLAND INDEPENDENT
SCHOOL DISTRICT, ET AL.,
Petitioners,

v.
TEXAS EDUCATION AGENCY, ET AL.,
Respondents,

UNITED STATES OF AMERICA,
Applicant for Intervention.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioners, Gregory-Portland Independent School District, K. D. Dreiling, George E. Cook, J. E. Bradford, R. G. Williams (deceased), Rodger M. East, Leonel Rios, Felix Guettler, and the minor children and residents of the Gregory-Portland Independent School District for whose benefit they sue, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 10, 1978.

OPINIONS BELOW

The following, listed in chronological order, are the pertinent opinions and orders of the trial court and of the Court of Appeals:¹

(1) The District Court's order preliminarily enjoining suspension of state accreditation and denial of state funds by the Texas Education Agency to Gregory-Portland Independent School District, dated January 24, 1974 (Appendix, p. 1);

(2) The District Court's memorandum opinion denying the motion of the Texas Education Agency to dismiss for want of jurisdiction, dated February 28, 1974 (Appendix, p. 6);

(3) Opinion of the United States Court of Appeals for the Fifth Circuit refusing the United States' request that the United States District Court for the Southern District of Texas be mandamus to dismiss this proceeding or to transfer it to the United States District Court for the Eastern District of Texas, dated December 30, 1974 (Reported at 506 F.2d 383) (Appendix, p. 11);

(4) The District Court's Memorandum and Order finding no unconstitutional discrimination on the part of Gregory-Portland Independent School District, and permanently enjoining suspension of funds and denial of accreditation to the School District by the Texas Education Agency, dated January 30, 1976 (Appendix, p. 14);

(5) The District Court's judgment permanently enjoining suspension of funds and denial of accreditation by the Texas Education Agency to Gregory-Portland Independent School District, dated January 30, 1976 (Appendix, p. 28);

(6) The District Court's order denying the United States' motion for leave to intervene, dated May 14, 1976 (Appendix, p. 30);

(7) Opinion of the United States Court of Appeals for the Fifth Circuit vacating all orders and dissolving the permanent injunction entered by the United States District Court for the Southern District of Texas, and directing the dismissal of the case or its transfer to the United States District Court for the Eastern District of Texas, dated July 10, 1978 (reported at 576 F.2d 81) (Appendix, p. 38);

(8) Letter from the Clerk of the United States Court of Appeals for the Fifth Circuit advising that Petitioners' petition for rehearing and petition for rehearing *en banc* had been denied, dated September 22, 1978 (Appendix, p. 43);

(9) Judgment of the United States Court of Appeals for the Fifth Circuit in conformity with its prior opinion, issued as mandate October 2, 1978 (Appendix, p. 44);

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit was rendered on July 10, 1978 (Appendix, p. 38), and a petition for rehearing and for rehearing *en banc* were timely filed. The two petitions were denied on September 22, 1978 (Appendix, p. 43).

This Court has jurisdiction to review the action of the United States Court of Appeals for the Fifth Circuit pursuant to the provisions of Title 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. May a federal district court, acting through the medium of a mandatory injunction directed to a state

1. Pursuant to the provisions of Supreme Court Rule 23(i) the Appendix is separately presented because of its volume.

agency (here the Texas Education Agency, a defendant in *United States v. Texas*²), establish a presumption that unconstitutional discrimination has occurred in any school district in the state which has a single school with a Mexican-American enrollment exceeding 66%, require that such school districts be denied accreditation and state funds, and then impose upon those who seek relief the burden of proving, in a distant and inconvenient forum, that no discrimination has occurred?

2. May Texas school districts, such as Gregory-Portland Independent School District, which are separate legal entities and which were not parties to *United States v. Texas*, prove to the Texas Education Agency in local federal courts that they have never discriminated against Mexican-Americans, and that the condition precedent to the imposition of the sanctions set out in *United States v. Texas* therefore does not exist, or must that proof always be made in the Eastern District of Texas?

3. Did the United States Court of Appeals for the Fifth Circuit err in vacating the orders of the United States District Court for the Southern District of Texas at the request of the United States, which was not a party to the original proceeding and which, to this very day, has not been granted leave to intervene at either the trial or appellate level?

STATEMENT OF THE CASE

Petitioners, a group of Anglo and Mexican-American parents and the Gregory-Portland Independent School District, instituted this suit in the United States District

2. 321 F.Supp. 1043 (E.D. Tex. 1970), 330 F.Supp. 235 (E.D. Tex. 1971), aff'd. and mod. 447 F.2d 441 (5th Cir. 1971), cert. den. 404 U.S. 1016, 92 S.Ct. 675 (1972).

Court for the Southern District of Texas, Corpus Christi Division (hereafter "the Southern District Court"). The defendant was the Texas Education Agency (the "TEA"); the purpose of the suit was to enjoin the suspension by the TEA of the School District's accreditation and participation in state funds by demonstrating that the School District had never discriminated against Mexican-Americans. The United States was not a party to the suit and has never been granted leave to intervene; it is not a party now.

Suspension of the School District's accreditation was a serious matter. It would have resulted in the refusal by other school districts to accept earned credits of students transferring from Gregory-Portland, and in the inability of its graduating seniors to gain admission to college. Loss of its half million dollar share of state funds would have rendered impossible the conduct of the Gregory-Portland educational program.

The TEA's proposed suspension of the School District's accreditation and withholding of state funds were in obedience to orders directed to the TEA by the United States District Court for the Eastern District of Texas, Tyler Division (the "Eastern District Court") in *United States v. Texas*, a suit to which Gregory-Portland has never been a party. The suspension was to be effective without a hearing of any type, based solely upon enrollment reports which reflected a 92% enrollment of Mexican-Americans at one of the School District's three elementary schools. [Appendix, p. 2, paras. (2),(3)].

Since the force which impelled the TEA was an order of the Eastern District Court in *United States v. Texas*, a description of that litigation is necessary.

In *United States v. Texas, supra*, the Eastern District Court was confronted with a classic school desegregation case arising out of the "creation and continued maintenance of nine all-Black school districts." 321 F.Supp. at 1045. The TEA was also a party to the suit, and was charged with having "failed as the chief supervisory body of public education in Texas and as disburser of State educational assistance, adequately to oversee and supervise the districts within the State so that no child was denied on the ground of race the benefits of programs supported by Federal funds." 321 F.Supp. at 1045.

The suit was clearly directed to dismantling of a dual system of schools previously maintained pursuant to a state law requiring segregated facilities for black and white children. The existence of past discrimination against blacks was a conceded fact. The suit was in no way concerned with alleged segregation of or discrimination against Mexican-American children. No state legislation has ever required the maintenance of separate school facilities for Mexican-Americans. No federal court, including the Eastern District Court, has ever declared that Mexican-Americans have been generally discriminated against by all school districts in the State, or by the Gregory-Portland Independent School District in particular.

Noting the legislative history requiring dual school systems for black and white children (321 F.Supp. at 1050), the Eastern District Court concluded that equitable relief was required and meted out that relief in two separate orders. The first order was directed to the preparation of desegregation plans for the specific school districts which were parties to the suit. 321 F.Supp. 1059-1060. The second order, in rather general

terms, enjoined the TEA from assisting directly or indirectly in the maintenance or re-creation of a dual school system within the State of Texas (321 F.Supp. 1060-1062); it directed the TEA to report to the Court each school district in the State of Texas having one or more schools with an enrollment composed of "more than 66% of members of a minority group or more than 90% of the caucasian race", and to outline any actions taken by the TEA to assist those school districts in eliminating "racially identifiable schools." 321 F.Supp. at 1062. In a supplemental order the Eastern District Court reviewed its earlier order and the responses of the Texas Education Agency, of the United States, and of the various school districts which were parties to the suit, to the plan incorporated in the original order. *United States v. Texas*, 330 F.Supp. 235 (E.D. Texas 1971). On appeal, the orders of the trial court were modified in particulars not here important and affirmed. *United States v. Texas*, 447 F.2d 441 (5th Cir. 1971), cert. den. 404 U.S. 1016, 92 S.Ct. 675 (1972). Upon receipt of the Fifth Circuit's opinion, the Eastern District Court entered a Modified Order dated July 13, 1971, conforming its earlier orders with the Fifth Circuit's ruling. (Appendix, p. 46)

The Modified Order directed the suspension of accreditation and/or funds of school districts which engaged in transfer policies [Appendix, p. 49, para. A(4)], changed school boundaries [Appendix, p. 50, para. B (4)], operated transportation systems [Appendix, p. 53, para. C(4)], permitted extra-curricular activities [Appendix, p. 54, para. D(4)] or engaged in hiring practices [Appendix, p. 57, paras. E(4) and (5)], in such manner as to impede desegregation or to encourage discrimina-

tion. No such sanctions were directed to student enrollment. The Modified Order provided only that the TEA should

". . . (R)eview each year all school districts in the state in which there exist schools enrolling more than 66% minority group students . . . and shall make findings as to whether or not the student assignment plans of these districts have resulted in compliance with federal constitutional standards. [Appendix, p. 58, para. F(3)]

On August 9, 1973, however, the Eastern District Court amended its Modified Order of July 13, 1971 in a number of important respects. (Appendix, p. 63) First, the TEA's review of school districts with individual schools having enrollments of 66% minority students was no longer directed toward a determination that the student assignment plans "resulted in compliance with federal constitutional standards," as the previous order provided. Now the standard was completely different. The inquiry to be made was

". . . (W)hether or not the student assignment plans of these districts have resulted *in compliance with the terms of this order.*" [Appendix, p. 63, para. F(3)]

Moreover, the August, 1973 amendment directed the TEA to notify each school district in which there were schools enrolling more than "66% minority group students" that the district was in violation of the Eastern District Court's order and to provide each such district with a detailed plan "designed to eliminate all such violations." [Appendix, pp. 68-69, paras. F(3),(4)] Upon

the failure of such a district to implement a plan "eliminating all racially or ethnically identifiable schools" found to be in violation of the Court's order "as provided by paragraph F(3)"—the 66% standard—accreditation and further participation in state educational funds were to be suspended. [Appendix, p. 69, paras. F(4), (5)] By way of small consolation, second only to none at all, the order provided that a district aggrieved by the loss or proposed loss of funds and accreditation had the right to petition the Eastern District Court "for such relief as said court may deem proper." [Appendix, p. 70, para. F(8)]

Shortly after the entry of the August, 1973 order, the TEA gave notice that because one of Gregory-Portland's elementary schools failed to meet the Eastern District Court's statistical standards, suspension of accreditation and funds was forthcoming if a new student assignment plan were not adopted.

Gregory-Portland had never discriminated against Mexican-Americans, as the Southern District Court subsequently found after a full trial. (Appendix, pp. 14-27) And so it and a group of parents sued the TEA in the Southern District Court in Corpus Christi, Texas, a scant seven miles away. They sought a declaration that the School District had not engaged in unconstitutional segregation of its children and that there was therefore no basis for federal court-ordered intervention; they requested that the TEA therefore be enjoined from suspending accreditation and funds on the basis of its contention to the contrary.

The trial court entered a temporary restraining order, enjoining suspension of accreditation and funds until an

evidentiary hearing could be had. (Appendix, p. 1) The Texas Education Agency then filed a motion to dismiss the suit for want of jurisdiction or, alternatively, to transfer the cause to the Eastern District Court in Tyler, Texas. Although it was not a party to the suit, the United States filed an *amicus curiae* brief in support of the TEA's motion. After hearing evidence, the Southern District Court denied the motion to dismiss or transfer, and continued the preliminary injunction in force pending the trial of the discrimination question on its merits. (Appendix, p. 6)

The United States thereupon petitioned the United States Court of Appeals for the Fifth Circuit for a writ of mandamus or prohibition directing the dismissal of the case for want of jurisdiction or its transfer to the Eastern District Court. The writs were denied, both because the United States was not a party to the proceeding and because the Fifth Circuit perceived no inevitable conflict between the judgment to be entered by the Southern District Court and the orders of the Eastern District Court. *United States v. United States District Court, Southern District of Texas*, 506 F.2d 383 (5th Cir. 1974). (Appendix, p. 11)

Though the discrimination issue was now to be tried on its merits in the Southern District Court, the United States refused to intervene or otherwise seek active party status in the litigation. The case was tried on its merits in Corpus Christi. The Southern District Court concluded that the Gregory-Portland Independent School District had never engaged in unconstitutional conduct vis-a-vis its Mexican-American students and residents, and that there was therefore no basis upon which a

federal court, acting through the TEA, could or should suspend accreditation and funds. It permanently enjoined the suspension. (Appendix, p. 14)

At this belated point, the United States finally sought leave to intervene. The Southern District Court concluded that the interest asserted by the United States—confined, as it was, solely to venue, i.e., whether the trial of the case should have taken place in the Eastern District rather than in the Southern District—was an insufficient interest to warrant intervention, and entered an order denying the petition. (Appendix, p. 30) The United States appealed from that order alone. Its notice of appeal was filed on June 14, 1976, seventy-six days after the expiration of the sixty-day period accorded the United States to appeal from the January 30, 1976 merits opinion and judgment. Rule 4(a), Federal Rules of Appellate Procedure.

Not joined by the Texas Education Agency which was apparently satisfied that no basis existed for suspension of funds or accreditation, the United States again proceeded to the Court of Appeals for the Fifth Circuit. This time it sought leave to intervene and, subject to such leave, requested the dismissal or transfer of the case to the Eastern District Court. Leave to intervene was never granted by the Fifth Circuit. Instead, acting at the request of the non-party United States, the Court of Appeals concluded that the trial of the threshold question of discrimination by the Southern District Court "interfered with the integrity of the order from the Eastern District," vacated the permanent injunction and all orders entered, and directed that the case be dismissed

or transferred to the Eastern District Court, over 400 miles away from Gregory-Portland. (Appendix, p. 38)

The opinion of the Court of Appeals turns on its head well-established law with respect to the non-binding effect of a judgment on non-parties, and turns the Court's back to important considerations of economy and expeditious disposal of suits, both from the standpoint of the litigants and of the federal courts. If allowed to stand it will coerce myriad Texas school districts having large Mexican-American enrollments to make a choice for which there is no legal or equitable justification: accede to federal court-ordered reassignment of students or prove the non-existence of the threshold prerequisite to federal court intervention—discrimination—in the United States District Court for the Eastern District of Texas at Tyler, "no matter the miles to be traveled and the money to be spent." (Southern District Court's Order of February 28, 1974, Appendix, p. 8)

The Fifth Circuit was not 66% wrong, it was 100% wrong; thus this petition.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The trial court had jurisdiction of this suit because the claims asserted arose under the Constitution of the United States and the Civil Rights Act of 1964, 42 U.S.C. § 1983, and the amount in controversy exceeded \$10,000 exclusive of interest and costs. 28 U.S.C. §§ 1331 and 1343. Federal Court jurisdiction has not been challenged by any party or by the United States.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT

A. The inflexible standards and venue provisions set out in *United States v. Texas* were not binding on non-parties such as petitioners.

The erroneous disposition of this case by the Fifth Circuit exemplifies a point of view which perhaps explains mounting complaints concerning the cost of litigation and the law's delay. If allowed to stand, the decision below will add immeasurably to expense and delay in resolving disputes between the TEA and various Texas school districts as to the existence *vel non* of unconstitutional discrimination against Mexican-American children. The error is compounded by the lower court's disregard of established legal principles which pointed the way to a result which was practical, as well as legally correct.

The first principle which the Fifth Circuit ignored is the fundamental rule that one who is not a party to, is not in privity with a party to, or is not represented in a recognized capacity in a proceeding is not bound by a judgment entered therein. *Pennoyer v. Neff*, 95 U.S. 714 (1878); *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115 (1940); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434 (1971). In this Court's own language:

"It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry v. Lee*, 311 U.S. 32, 40-41, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). The consistent constitutional rule has been that a court has no power to

adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. E.g., *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418, 77 S.Ct. 1360, 1362, 1 L.Ed.2d 1456 (1957)."
Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100, 110, 89 S.Ct. 1562, 1569 (1969).

The Gregory-Portland Independent School District was not a party to and was not in privity with nor represented by a party to *United States v. Texas*. That the TEA was a party is of no moment. In Texas, each independent school district is an entity separate and distinct from the Texas Education Agency. Each is a "local public corporation," a "quasi-municipal corporation." *Love v. City of Dallas*, 40 S.W.2d 20 (Tex. 1931). The trustees of a given district are a "body corporate" and they, rather than the TEA, have the exclusive power to manage and govern the district. Texas Education Code, § 23.6.

Obviously flowing from the fact that Gregory-Portland was not a party to the Eastern District proceeding is the corollary: the Eastern District Court never presumed to find that whatever ethnic statistical imbalance existed in one or more of the Gregory-Portland elementary schools was the result of discrimination. Likewise, the Texas Education Agency never undertook such a determination. Instead, acting upon the arbitrary 66% standard established by the Eastern District Court, the TEA ordered the Gregory-Portland Independent School District to revise student assignment to eliminate ethnic imbalance at one of its elementary schools, imbalance which the Southern District Court determined, in a trial on the merits, did not result from unconstitutional conduct. The

TEA candidly stipulated that but for the Eastern District Court's inflexible order, suspension of funds and accreditation upon the School District's refusal to agree to a new plan of student assignment would never have been threatened. Clearly the Eastern District Court was doing nothing less than imposing a federal standard of student assignment on all non-party Texas school districts, through its orders to the TEA in *United States v. Texas*. This the Eastern District Court had no authority to do.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267 (1971), this Court said, in speaking to the question of court-ordered remedies:

"In seeking to define even in broad and general terms how far this remedial power extends, it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." 402 U.S. at 16, 91 S.Ct. at 1276.

"Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." 402 U.S. at 28, 91 S.Ct. at 1282.

Again, in *Winston-Salem/Forsyth County Board of Education v. Scott*, 404 U.S. 1221, 92 S.Ct. 1236 (1971), Mr. Chief Justice Burger, in passing on an application for stay, reaffirmed that:

"Under *Swann* and related cases of April 20, 1971, as in earlier cases, judicial power can be involved only on a showing of discrimination violative of the constitutional standards declared in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)." 404 U.S. at 1230, 92 S.Ct. at 1241.

In filing their suit in the Southern District Court, petitioners sought nothing more than to demonstrate the non-existence of the "constitutional violation" declared in *Swann* to be a prerequisite to "judicially ordered assignment of students on a racial basis." The trial court clearly understood. In entertaining petitioners' declaratory judgment action, it did not propose to interfere in any respect with the relationship between the Eastern District Court and the Texas Education Agency or with the orders by which that court undertook to control the activities of the TEA. The Southern District Court specifically stated:

"This court does not purport to contravene the Tyler order, but says that the Texas Education Agency has no right, under the Tyler order or any other order, to impose the sanctions it proposes without a proper finding of the existence of unconstitutional segregation. Without such a finding, there is no fault in the school district. * * * The issues will be generally the same as if minority residents had sought relief from the School District because of unconstitutional segregation, although, perhaps, the burden of proof may be on a different party." (Memorandum, Appendix, p. 9)

The trial court further noted that the Gregory-Portland Independent School District was clearly entitled to accreditation and participation in state funds,

". . . unless it should ultimately be determined that the Gregory-Portland Independent School District has engaged or is engaging in discriminatory practices violative of the United States Constitution or has refused to eliminate vestiges of past unconstitutional discrimination." (Memorandum, Appendix, p. 3, para. 6).

The Court emphasized that its only purpose in accepting jurisdiction was

". . . to determine the facts and draw its own conclusions of law as to whether or not there is existing unconstitutional segregation in this School District. If such exists, then Texas Education Agency would be entitled to enforce its sanctions, if same were proper, and any relief which the District might want from the sanctions of the Texas Education Agency would, necessarily, have to be gotten from the Tyler Court." (Memorandum, Appendix, p. 10).

By its own declaration, and in fact, the Southern District Court's exercise of jurisdiction to resolve the discrimination question was consistent with and in aid of, rather than adverse to, the orders of the Eastern District Court. That the Eastern District Court previously had spoken to one of the parties to the Corpus Christi proceeding did not preclude action not inconsistent therewith by the Southern District Court at the instance of one who was not a party to the earlier suit. Cf. *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 88 S.Ct. 602 (1968); *American Securit Co. v. Shatterproof Glass Corp.*, 268 F.2d 769 (3rd Cir. 1959), cert. den. 361 U.S. 902, 80 S.Ct. 210 (1959); *Williams v. Nylund*, 268 F.2d 91 (10th Cir. 1959).

As this Court has said in a different but similar constitutional inquiry:

"Those who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to

contest the State's claim or because they chose to do so and lost.

But it does not follow that a decision reached in such proceedings should conclusively determine the First Amendment rights of others. Nonparties like petitioner may assess quite differently the strength of their constitutional claims and may, of course, have very different views regarding the desirability of disseminating particular materials. We think they must be given the opportunity to make these assessments themselves, as well as the chance to litigate the issues if they so choose." *McKinney v. Alabama*, 424 U.S. 669, 676, 96 S.Ct. 1189, 1194 (1976).

B. Economy and efficiency dictated that the discrimination question be tried in the Southern District Court.

That the Southern District Court had jurisdiction of both the subject matter and of the parties is not questioned. The case was not one of lack of jurisdiction. The best the Fifth Circuit could muster was a conclusion that:

"By enjoining the TEA from following the order (of the Eastern District Court), the Southern District seriously interfered with the power of the Eastern District Court to maintain the integrity of the order." (Appendix, p. 41)

In all likelihood, this misapprehension by the Court of Appeals accounts for its erroneous disposition of the case. Since a transgression of constitutional rights is a condition precedent to the imposition of federal sanctions in school cases, there was no way in which the Southern District Court could "seriously interfere with the power

of the Eastern District Court to maintain the integrity of the order" if it did nothing more than determine whether the condition precedent existed. That was the only undertaking of the Southern District Court. There was to be no interference. If there was no constitutional violations there was no basis for the imposition of sanctions, and if there were a violation the Southern District Court had already determined and announced that it would not interfere.

The Fifth Circuit attempted to bolster its holding by asserting that "all of plaintiff's constitutional challenges could have as easily been made in the Eastern District." (Appendix, p. 41) Significantly, this statement is sans supporting factual recitations. It is not the case. The Court may judicially notice that Texas is a large state and that Corpus Christi and Tyler are far removed from one another. All of the parties and evidence necessary to determine whether Gregory-Portland had discriminated against Mexican-Americans were located in the small communities of Gregory and Portland, only seven miles from Corpus Christi, the site of the Southern District Court, but 412 miles from Tyler, the home of the Eastern District Court. The School District's attorneys are from Corpus Christi, the attorneys for the TEA are from Austin, Texas, and the attorneys for the United States are from Washington, D.C. Austin is 194 miles from Corpus Christi and 226 miles from Tyler. Both Corpus Christi and Tyler are equally inaccessible from Washington. How would a trial in Tyler be easier? The Fifth Circuit does not say. All of the evidence in the record is to the contrary. Gregory-Portland, the individual plaintiffs, all witnesses and documentary evidence, and counsel

for the plaintiffs were located within the Corpus Christi Division, where venue clearly lay [28 U.S.C. § 1391(b)]; and there are many school districts in other federal court districts and divisions of the State of Texas which have large Mexican-American populations, and which are even farther from Tyler than is Gregory-Portland.

C. The Eastern District Court's order which provoked the instant suit was based upon a standard which this Court has condemned.

In addition to the lack of a jurisdictional prerequisite to the intervention by the Eastern District Court in Gregory-Portland's student assignment, there was an additional fatal shortcoming in that Court's TEA-transmitted edict. The standard by which a school district was to be judged, and which any plan submitted to avoid swift loss of accreditation and funds must meet, was a flat and inflexible 66%. Though perhaps not strictly pertinent here, the Eastern District Court's order in this respect further demonstrates the injustice visited upon petitioners. Absence of constitutional violations was immaterial. If there were more than 66% minority students at a given school, the alternatives were reassignment or (if the Fifth Circuit's opinion is allowed to stand) travel to Tyler to seek relief, i.e., assume the burden of proof, and assume it in a forum so distant that the inconvenience and expense, including the inability to subpoena witnesses [Fed. Rule of Civil Procedure 45(2)], makes bearing the burden more difficult.

The genesis of this inequity is the Eastern District Court's refusal to heed still another well-established legal principle. There is no presumption that a large Mexican-

American enrollment at a school establishes the existence of past or present unconstitutional segregation, *ipso facto*. The existence of a high minority enrollment at one of the five schools within the Gregory-Portland Independent School District is no evidence whatsoever of a constitutional violation. *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), cert. den. 377 U.S. 924, 84 S.Ct. 1223 (1964); *Downs v. Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), cert. den. 380 U.S. 914, 85 S.Ct. 898 (1965); *Springfield School Committee v. Barksdale*, 348 F.2d 261 (1st Cir. 1965); *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), cert. den. 389 U.S. 847, 88 S.Ct. 39 (1967); *Offermann v. Nitkowski*, 378 F.2d 22 (2nd Cir. 1967).

Nor does the Eastern District Court's 66% yardstick rectify the erroneous shifting of the burden of proof. Inflexible ethnic or racial student ratios have been uniformly rejected by the federal courts as a constitutionally guaranteed right in the first instance, *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. 1, 91 S.Ct. 1267, or as a prescribed remedy for elimination of discrimination already established to exist. See *Cunningham v. Grayson*, 541 F.2d 538 (6th Cir. 1976), cert. den. 429 U.S. 1074, 97 S.Ct. 812 (1977)—inflexible ratios held an abuse of discretion; *Harrington v. Colquitt County Board of Education*, 460 F.2d 193 (5th Cir. 1972), cert. den. 409 U.S. 915, 93 S.Ct. 238 (1972), and *Brewer v. School Board of City of Norfolk, Va.*, 456 F.2d 943 (4th Cir. 1972), cert. den. 406 U.S. 933, 92 S.Ct. 1778 (1972)—ratios may be used as a starting point only. The Eastern District Court did not use the 66% standard as a starting point only. Failure to meet the standard at the outset, or to implement a plan

which would, brought suspension of funds and accreditation. Proof of discrimination was not a prerequisite to the imposition of sanctions. The shoe was automatically on the other foot. If a school district exceeded the Eastern District Court's 66%, it had to *disprove* discrimination in Tyler to recover what was otherwise automatically to be taken from it.

A school district is not required to prove that it has not discriminated. On the contrary, the burden is on him who contends that unlawful discrimination has existed. And when the question is presented, intent to discriminate, not statistics, is the proof required. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976); *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 93 S.Ct. 2686 (1973).

The substantive shortcomings in the orders of the Eastern District Court, gross as they are, are not the crux of the present petition, however. They simply exacerbate the unreasonableness of the Fifth Circuit's decision that after a trial on the merits in a convenient forum, this case must now be tried again. The result is unfair in the extreme. In this day of crowded dockets, when litigants justly complain of the law's delay and the tremendous expense incident to litigation, there is no justification for a court order which imposes on non-parties to the litigation in which an order was entered, the burden of seeking relief in a far-distant court from a sanction based upon an insupportable legal basis—the presumption that a large Mexican-American enrollment establishes the existence of unlawful segregation.

D. There is no legal precedent for the vacation of the Southern District Court's orders by the Court of Appeals at the instance of a non-party.

The United States found itself in difficult straits in its quest for a petition for writ of mandamus or of prohibition because it was not a party to the suit. A different panel of the Fifth Circuit noted that it could find no precedent for the granting of such a writ to one not a party to the litigation. *United States v. United States District Court*, 506 F.2d 83 (5th Cir. 1974) (Appendix, p. 11).

The United States was in no different posture before the Fifth Circuit on its appeal following the Southern District Court's trial of the discrimination case on its merits and its refusal of the United States' petition for leave to intervene. Leave to intervene has not been granted by any court to this very day. As the matter stands, the Fifth Circuit vacated the orders of the Southern District Court at the instance of a mere bystander. Although petitioners have found no case in which the impropriety of such action has been discussed, the United States, as it appeared before the Fifth Circuit, was not a party to the suit, and "only parties to a decree can appeal." *Farmers' Loan & Trust Co. v. Waterman*, 106 U.S. 265, 269, 1 S.Ct. 131, 134 (1882). Since the United States was not a party to the suit on its merits and did not have standing to appeal to this Court from an adverse ruling of the Fifth Circuit, it is difficult to understand how it had standing to obtain a ruling at all.

In short, leave to the United States to intervene was as much a prerequisite to the Fifth Circuit's vacation of the Southern District Court's judgment on the merits as

was a violation of constitutional rights to the TEA's suspension of Gregory-Portland's accreditation and state funds. The Fifth Circuit erred in directing the Southern District Court to dismiss the case on its merits, and compounded that error by ordering the dismissal at the instance of one not a party to the suit at the trial or appellate level.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

RICHARD A. HALL
 J. W. GARY
 100 Hawn Building
 Corpus Christi, Texas 78401

By: _____
Attorneys for Petitioners

CERTIFICATE OF SERVICE

This is to certify that on December 15, 1978, three copies each of the foregoing Petition for Writ of Certiorari and the Appendix thereto were served upon the Texas Education Agency and the United States of America by depositing each set of copies in a United States Post Office, with first class postage prepaid, properly addressed to counsel of record as follows:

Hon. J. Stanley Pottinger,
 Assistant Attorney General of the United States
 Department of Justice,
 Washington, D.C. 20530.

Hon. Roland Allen,
 Assistant Attorney General of the State of Texas,
 Post Office Box 12548 Capitol Station,
 Austin, Texas 78711.

Hon. Wade H. McCree, Jr.,
 Solicitor General of the United States,
 United States Department of Justice,
 Washington, D.C. 20530.

RICHARD A. HALL